IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1625

THOMAS JACKSON STONES, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Thomas Jackson Stones, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District entered in this proceeding on November 14, 1978.

OPINION BELOW

The unreported opinion of the Court of Appeal appears in the appendix to this petition (Appendix "A"), as does the order of the California Supreme Court denying a hearing to review that opinion (Appendix "B").

JURISDICTION

The judgment of the California Court of Appeal for the Second Appellate District was entered on November 14, 1978. A timely Petition for Rehearing was denied on December 12, 1978, and the California Supreme Court denied a timely Petition for Hearing on January 24, 1979. This Petition for Writ of Certiorari was filed within ninety days of the California Supreme Court's denial of a hearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. **Whether a probation revocation resulting from a hearing conducted without prior notice of alleged violations fails to afford a probationer due process guaranteed to him by the Fifth Amendment.**

2. **Whether an appellate court may rely upon grounds not relied upon by the finder of fact in affirming a revocation of probation.**

STATUTORY PROVISIONS INVOLVED

California Penal Code § 1203.2: Rearrest of Probationer; revocation of probation . . . :

"(a) At any time during the probationary period of a person released on probation . . . , any probation or peace officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him before the court or the court may, in its discretion, issue a warrant for his rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest, the court may revoke and terminate such probation if the interest of justice shall require and the court, in its judgment, has reason to believe from a report of the probation officer or otherwise that the person has violated any of the conditions of his probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he has been prosecuted for such offenses . . . .

"(b) Upon its own motion or upon the petition of the probationer or the district attorney of the county in which the probationer is supervised, the court may modify, revoke, or terminate the probation of the probationer pursuant to this subdivision. The court shall give notice of its motion, and the district attorney shall give notice of his petition to the probationer, his attorney of record, and the probation officer; the probationer shall give notice of his petition to the probation officer; and notice of any such motion or petition shall be given to the district attorney in all cases. The court shall refer its motion or the petition to the probation officer. After the

receipt of a written report from a probation officer, the court shall read and consider the report and either its motion or the petition and may modify, revoke or terminate the probation of the probationer upon the grounds set forth in subdivision (a) if the interests of justice so require.

"The notice required by this subdivision may be given to the probation officer upon his first court appearance in such proceeding . . . . "

STATEMENT OF THE CASE

Thomas Stones was convicted upon a plea of nolo contendere of conspiracy and fraud in connection with the sale of securities and was granted probation for a term of ten years. Among the conditions of that probation was the requirement that Stones "not participate in any way in the sale or dissemination of any securities or tax shelter programs without first seeking approval of the program or venture from the appropriate authorities . . . . " In addition, Stones was prohibited from "participat[ing] in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the Probation Office supervising his probation and, if the venture would likely take place in whole or in part in Ventura [or Los Angeles] County, he shall not participate in this venture without first fully informing the District Attorney of the County of Ventura [or Los Angeles as the case may be] of the details of the contemplated venture." Further, Stones' conditions of probation required that he "obey all laws, orders, rules and regulations of the Court and of the Probation Department."

While on probation, Stones met with Laurence Casey, an FBI special agent, and Charles Marko, a government informant. Casey was posing as an insurance company executive seeking to remedy a dollar impairment in his company by the acquisition of securities at discount. At the meeting, Stones agreed to provide $46,000 worth of bonds for $2,000 in cash and Marko's note for $4,500. Casey was later advised by a fellow agent that the bonds were stolen, but charges against Stones for theft of the bonds were dismissed.

On November 28, 1977, Stones' probation was revoked and he was ordered imprisoned for the term prescribed by law for his crime. The trial court concluded that Stones' agreement with Casey and Marko violated the conditions of his probation that he not participate in the sale or dissemination of any securities or tax shelter programs without first seeking approval of the program or venture from the appropriate authorities, and that he not participate in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the Probation Officer and District Attorney. (Appendix pp. 2 - 4).

Stones appealed the revocation of his probation to the California Court of Appeal. In its Opinion affirming that revocation, the Court of Appeal agreed with Stones that there was no probation violation in his not seeking agency approval for sale of the bonds to Casey and that there was no evidence that he failed to inform the District Attorney and Probation Office of his intention to sell the bonds. (Appendix p. 5).

The Court of Appeal, however, affirmed the action

of the trial court based upon its implicit finding that no notice had been provided to the Probation Office or the District Attorney of Stones' intention to sell bonds. The Court of Appeal said that that implicit finding could have been based upon the statement in the *probation report* that Stones did not notify the Probation Office or the District Attorney of his intention to sell bonds and that "even in the absence of an affirmative showing by respondent of the fact that there was no notice given to the Probation Office or the District Attorney of appellant's activities in securities," affirmance was appropriate, "since being in the nature of a negative averment, the burden for showing the contrary may fairly be placed upon appellant." (Appendix p. 6).

Finally, the Court of Appeal conceded that Stones had not been provided with written notice of claimed violations of probation, but said that he could not raise the issue because he participated in the hearing without objection and "cannot now be heard to complain." (Appendix p. 6).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of This Court Requiring Notice To Probationers Of Their Alleged Violations Of Probation Prior To Probation Revocation Hearings.

Prior notice of the charges a person must answer is a basic requirement of due process, one that is clearly required in the context of parole or probation revocations.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); see *In re Gault*, 387 U.S. 1, 31 - 34 (1967); *cf. Goldberg v. Kelley*, 397 U.S. 254, 267 - 68 (1970). Even the State of California seems to agree, for it did not challenge the holding of the Ninth Circuit with regard to notice in the case of *Clutchette v. Procunier*, 497 F.2d 809, 818 (9th Cir. 1974). *Baxter v. Palmigiano*, 425 U.S. 308, 324 n. 6 (1976).

The function of notice is to give the charged party a chance to marshal the facts in his defense and to prepare to meet the charges against him. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1964). Thus, in order to meet constitutional muster, notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged conduct with particularity.' " *In re Gault, supra*, 387 U.S. at 33 (footnote omitted).

In the context of this case, notice was especially critical. Had the basis of the state's charges been disclosed in a timely fashion, Stones might well have pointed out to the trial court, as he was successfully able to do on appeal, that the acts complained of did not violate all of the conditions of probation found by the trier of fact to have been violated. Such a result might well have altered the decision of the trial court to revoke probation.

The failure of the trial court to provide Stones with a written statement of his alleged violations of probation made the proceedings in the trial court a farce and a sham. See *Powell v. Alabama*, 287 U.S. 45, 57 (1932).[1] Stones'

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[1] See *Gagnon v. Scarpelli, supra*, 411 U.S. at 789.

probation was revoked without his ever having the opportunity to prepare to meet and answer the charges against him. It was revoked in a manner which deprived him of due process of law guaranteed to him by the Fifth Amendment, and that revocation should be set aside.

2. The Reliance By An Appellate Court On Grounds Not Relied Upon By The Finder Of Fact In Affirming A Probation Revocation Flies In The Face Of The Rationale Behind This Court's Decision In *Gagnon v. Scarpelli.*

Gagnon v. Scarpelli, following *Morrissey v. Brewer,* set forth a procedure for determining the appropriateness of the decision to continue or to terminate a person's freedom on probation consistent with due process. Both *Gagnon* and *Morrissey* require that a decision to revoke probation or parole be accompanied by a "written statement by the factfinders as to the evidence relied upon and the reasons for revoking [probation or] parole." *Gagnon v. Scarpelli, supra,* 411 U.S. at 786.

The requirement in *Gagnon* that a finder of fact set forth his reasons for revoking probation and the evidence relied upon by him is a meaningless one if a reviewing court may substitute its own reasons or evidence for those of the factfinder. If the hearing mandated by the due process clause is to be a meaningful one, the decision of the factfinder must be reviewed by an examination of the correctness of his actions as he saw them. The reviewing court must determine whether the evidence relied upon by the factfinder supports *his* reasons for revoking probation.

Here, the Court of Appeal substituted its own reasons for revocation for those of the factfinder and its own evidence relied upon for his. That action was tantamount to a new "hearing" in the Court of Appeal, but one without evidence or the opportunity to be heard. The Court of Appeal did not *review* the reasons for revocation and the evidence relied upon by the finder of fact but redetermined the correctness of his *conclusion* and affirmed the revocation. That court was improper and not in compliance with due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District.

Respectfully submitted,

BURTON MARKS of

MARKS, GREEN & DENBO

Counsel for Petitioner

INDEX TO APPENDIXES

APPENDIX "A"

OPINION BELOW

NOT FOR PUBLICATION

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. THOMAS JACKSON STONES, JR., Defendant and Appellant

2D CRIM. NO. 32160 (Super. Ct. No. A 132932).

[FILED November 14, 1978]

Appellant was convicted on a plea of nolo contendere of conspiracy and fraud in the sale of securities; judgment was suspended and appellant was granted probation for a period of ten years, conditioned inter alia upon the commitment he would "not participate in any way in the sale or dissemination of any securities or tax shelter programs without first seeking approval of the program or venture from the appropriate authorities, including but not limited to the Securities Exchange Commission, The California Division of Corporations, and the State Franchise Tax Board" nor "participate in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the Probation Office supervising his probation and, if the venture will likely take place in whole or in part in Ventura [or Los Angeles] County, he shall not participate in the venture without first fully informing the District Attorney of the County of Ventura [or Los Angeles as the case might be] of the details of the contemplated venture."

A further condition of appellant's probation required he would "obey all laws, orders, rules and regulations of the Court and of the Probation Department." On November 28, 1977 probation was revoked and appellant was ordered imprisoned for the term prescribed by law for his crimes. The appeal is from that determination.

The evidence elicited at the revocation hearing disclosed Laurence Casey, an F.B.I. special agent, met with appellant and Charles Marko in October of 1976 as part of an investigation of appellant's activities in securities transactions. Casey posed as an insurance company executive seeking to remedy a dollar impairment in his company through the acquisition of financial paper at discount. Marko was an acquaintance of appellant and a government informant.

Appellant ultimately agreed to provide $46,000 worth of bonds against receipt of $2,000 in cash and Marko's note for $4,500. Casey was later advised by a fellow agent the bonds were stolen, although charges against appellant in a prosecution for the alleged theft were dismissed.

Other activities of appellant claimed to be questionable were also touched upon without any clear showing they were illegal or attributable to appellant.

The trial court concluded:

"THE COURT: The Court finds the defendant in violation of his probation, and would state on the record its reason for so doing.

"It finds that the defendant did in fact engage in conduct that was expressly prohibited by the condition

set forth in the probation report, namely, I believe it would be condition number 7, the defendant shall not participate in any way in the sale or dissemination of any securities or tax shelter program without first seeking approval of the program or venture from the appropriate authorities, including but not limited to the Securities Exchange Commission, the California Division of Corporations, and the State Franchise Tax Board, and I think eight would also apply, shall not participate in any way in the sale or dissemination of any securities or tax shelter programs without first notifying the probation officer or office supervising the probation, and the venture would likely take place in whole or in part in Ventura County, he shall not participate in the venture without first fully informing the district attorney of the County of Ventura of the details of the complete venture.

"The Court finds after its research that a bond, promissory note are both defined in Corporations Code Section 25019 as securities within the contemplation of that code, and the defendant, the Court finds, sold these bonds and took in return a promissory note, so he would be in direct violation of these conditions that were set forth in the probation report.

"There are numerous other matters that the defendant has engaged in that would indicate that he probably is in further violation, but I think on the record that this one transaction would be the one most obvious and most significant.

"The Court would also find that the defendant as a reasonable person certainly had reasonable cause to believe these items were stolen or were in some manner

acquired improperly, and he was on notice of that fact in view of the sale price of these items was substantially lower than their face value and indeed substantially lower than their value, period, irrespective of face value."

Appellant contends:

1. There was no violation of the previously herein quoted terms of probation.

2. The judgment cannot be sustained on the theory the bonds were stolen and that therefore appellant failed to obey all laws.

3. That the *"Morrissey-Vickers"*[1] requirements were not met in that:

(a) appellant was not given written notice of the claimed violations;

(b) he was not accorded the right to confront and cross-examine adverse witnesses; and

(c) there was no prerevocation hearing.

As part of its first contention, appellant urges there is no evidence in the record showing he did not first seek approval from the enumerated agencies and that even if there were it would be of no consequence, because such approval could not have been obtained in any event. The Franchise Tax Board, he maintains, is without authority to "approve" securities transactions and the Division of Corporations and SEC are expressly prohibited from so doing. Moreover, he says, the issuance or transfer involved could not have been registered with the Commission nor

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[1] *Morrissey v. Brewer* (1972) 408 U.S. 471; *People v. Vickers* (1972) 8 Cal.3d 451.

qualified by the Division's permit since the securities were exempt or the transaction he engaged in was exempt. (See Corporations Code, sections 25100(a), (e); 10 California Administrative Code, Special Publications, Release No. 27-c; 15 U.S.C. sections 77c(2), 77d(1).)

Similarly, the argument is made, there is no evidence appellant did not inform the district attorney and no finding he failed to inform the probation office. It is conceded the probation report contains a statement that appellant never discussed with the probation officer an intention to engage in the sale of securities, that the report was read by the trial court (which stated it would be received), but maintained that, in fact, it was neither marked as an exhibit nor actually received in evidence.

There could be doubt whether an adequate showing was made which would have supported the conclusion appellant was aware the bonds were stolen. (See *People v. Buford* (1974) 42 Cal. App. 3d 975.) Accordingly, we accept appellant's second contention. We are likewise inclined, for purposes of argument, to accept appellant's ingenious, if strained, contention there was no probation violation in his not seeking agency approval for sale of the bonds to Casey. But we find no difficulty in concluding the trial court was justified in its action based upon its implicit finding no notice had been provided to the probation office or the district attorney. A probation revocation proceeding is not circumscribed by the requirements of more formal proceedings. The revocation hearing "is not to be equated with a criminal prosecution in any sense. It is a narrow inquiry, and its procedures are to be flexible." (*People v. Buford, supra,* at p. 983.) So where, as

here, there is no doubt reliance is placed upon documentary information contained in a probation report and that fact is clear to the probationer, it is not true that failure to have the document formally received in evidence is fatal.

Additionally, probation may be revoked if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer *or otherwise* that the probationer has violated any condition of his probation. (Penal Code, section 1203.2(a).) And while the statutory phrase contained in section 1203.2(a) " 'or otherwise' must refer to a showing comparable to or of equal solemnity with a report of a probation officer," (*In re Davis* (1951) 37 Cal. 2d 872, 874), that requirement is satisfied when testimony of a credible witness like Casey sufficiently shows appellant's misconduct.

Thus, whether we conclude the probation report was properly considered or that the court could have based its determination on Casey's testimony, the result is the same, and this is so even in the absence of an affirmative showing by respondent of the fact there was no notice given to the probation office or the district attorney of appellant's activities in securities, since being in the nature of a negative averment, the burden for showing the contrary may fairly be placed upon appellant. (See *People v. Montalvo* (1971) 4 Cal. 3d 328.)

Concerning appellant's claim he was not provided written notice of claimed violations, it is enough to say he participated fully in the hearing without objection at its outset and during the course thereof and cannot now be heard to complain. (*People v. Baker* (1974) 38 Cal. App. 3d 625; see also *People v. Buford, supra*; cf. *In re Duran* (1974) 38 Cal. App. 3d 632.)

Appellant's contention he was not accorded the right to cross-examine adverse witnesses is relevant only to the assertion he had failed to obey all laws in that he had engaged in other questionable transactions and that he was aware the bonds sold to Casey were stolen. We have pointed out neither of these assertions formed the basis for the trial court's conclusion regarding failure to notify and neither is pertinent on this appeal. (See *In re La Croix* (1974) 12 Cal. 3d 146.)

Finally, appellant's contention he should obtain relief because no prerevocation hearing was held cannot be sustained. The setting contemplated for the requirement, as derived from *Morrissey v. Brewer, supra,* is one where a parolee or probationer is arrested and deprived of his conditional freedom pending a revocation determination which might be long in coming. Just as in the case of one accused of crime, the accepted conclusion is there must be some preliminary opportunity to be heard on the question whether the further contemplated proceedings are justifiable. Here, however, the record appears to indicate no deprivation of liberty occurred, at least insofar as revocation was concerned.[2]

Moreover, even if it were established otherwise, appellant raised no objection on the point before the trial court and it is not available to him now. (*People v. Hawkins* (1975) 44 Cal. App. 3d 958; cf. *People v.*

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[2]Appellant was independently charged with receipt of stolen property and the revocation hearing was set to trail that matter. We are not aware whether any continuing custody was involved in that case but there is no indication that in the instant matter appellant was ever anything but free on his own recognizance.

Hidalgo (1978) 78 Cal. App. 3d 675.)

The judgment appealed from is affirmed.

NOT FOR PUBLICATION.

ROTH, P.J.

We concur:

FLEMING, J.

COMPTON, J.

APPENDIX "B"

DENIAL OF HEARING
(Post Card)

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Jan. 24, 1979

I have this day filed Order

HEARING DENIED

In re: 2 CRIM. NO. 32160

People of the State of California

vs.

Thomas Jackson Stones, Jr.

Respectfully,

G. E. Bishel,
Clerk.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on APRIL 23, 1979, I served the within PETITION FOR WRIT OF CERTIORARI (THOMAS JACKSON STONES, JR. vs. STATE OF CALIFORNIA) on the following named party by depositing two copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said party at the address as follows:

OFFICE OF THE ATTORNEY GENERAL
3580 Wilshire Boulevard
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 23 1979, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Document forwarded to Washington, D. C. - Monday, April 23, 1979, via EXPRESS MAIL.

Dean-Standefer, 326½ Main St., Huntington Beach, California 92648
(714) 536-7161

In the Supreme Court of the United States

October Term, 1978
No. 78-1625

THOMAS JACKSON STONES, JR.,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner received adequate notice of the claimed violation of probation and whether petitioner was provided with a sufficient opportunity to prepare to answer the charges against him so that due process guarantees were satisfied.

2. Whether the reviewing court substituted its own reasons and evidence for those of the trial court in upholding the revocation of probation and thus denied petitioner findings of fact as to reasons for revocation.

STATEMENT OF THE CASE

After pleading nolo contendere to charges of conspiracy and fraud in the sale of securities, petitioner was placed on felony probation in Ventura County for a period of ten years upon certain terms and conditions. One of the terms of probation was that petitioner not participate in any manner in the sale or dissemination of any securities without first seeking approval of the venture from appropriate authorities. Another condition of probation was that petitioner not participate in any way in the sale or dissemination of any securities without first notifying the probation officer supervising his probation and without first informing the district attorney of the details of the contemplated venture.

Subsequently, petitioner's probation supervision was transferred from Ventura County (the county of indictment and original probation) to Los Angeles County. On June 1, 1977, the Los Angeles County District Attorney filed a formal violation of probation allegation against petitioner, which was ordered to trail another case then pending against petitioner. Subsequently, probation revocation hearings were held in Los Angeles Superior Court on October 13 and October 21, 1977; at the conclusion of the hearings, petitioner was found to be in violation of probation, probation was revoked and he was sentenced to state prison for the term prescribed by law. The court specifically found that petitioner engaged in conduct which was expressly prohibited by the conditions of probation, in that petitioner had sold securities (bonds) without first seeking the approval from appropriate authorities and without first notifying the probation officer and the district attorney, in that petitioner sold several stolen bonds which were defined as securities under the California Corporations Code to an undercover FBI agent

posing as a buyer. The court further found that petitioner, as a reasonable person, had reasonable cause to believe that the bonds were stolen or in some manner acquired improperly, because the sale price of the bonds was substantially lower than their face value.

On appeal to the Court of Appeal of the State of California, Second Appellate District, Division Two, the revocation of probation was affirmed in a unanimous opinion not certified for publication. In its opinion, the Court of Appeal pointed out that the probation violation report contained a statement that petitioner had never discussed with his probation officer his intention to engage in the sale of securities, and that this report had been read by the trial court. The Court of Appeal further held that the trial court was justified in revoking petitioner's probation based upon its implicit finding that no notice had been provided to the probation officer or the district attorney. (Petn. p. 5.)

The Court of Appeal additionally ruled that there was sufficient evidence from the testimony of the FBI agent to show petitioner's misconduct so that the revocation was proper under California Penal Code section 1203.2(a), which section provides that if the trial court has reason to believe from the report of the probation officer *or otherwise* that the probationer has violated any condition of probation, probation may be revoked if the interests of justice so require. (Petn. App. p. 6.)

The Court of Appeal further stated that petitioner could not raise the issue of alleged failure of written notice of the claimed violations of probation since he participated fully in the probation revocation hearings without objection at the outset or during the course thereof. (Petn. App. p. 6.) Further, the Court of Appeal ruled that petitioner's contention that he should obtain relief because no pre-

revocation hearing was held could not be sustained, because no deprivation of petitioner's liberty occurred insofar as revocation was concerned, and because petitioner raised no objection on this point before the trial court and therefore was barred from objecting on appeal on that ground. (Petn. App. pp. 7-8.)[1]

ARGUMENT

I.

PETITIONER WAS GIVEN MORE THAN ADEQUATE NOTICE OF THE ALLEGED VIOLATIONS OF PROBATION PRIOR TO THE REVOCATION HEARING, HAD AMPLE OPPORTUNITY TO PREPARE TO ANSWER THE CHARGES AND, IN ANY EVENT, RAISED NO OBJECTION ON THE DUE PROCESS GROUND OF LACK OF NOTICE IN THE TRIAL COURT.

Petitioner's main contention is that due process under the Fifth Amendment was violated because the trial court failed to provide him with "a written statement of his alleged violations of probation" and that probation was revoked without petitioner's having "the opportunity to prepare to meet and answer the charge against him." Petitioner asserts that if the basis of the State's charges had been disclosed in a "timely fashion" he might have been able to point out to the trial court that the acts complained of did not violate "all of the conditions" of probation eventually found by the trier of fact to have been violated. (Petn. pp. 6-8.)

[1]Petitioner does not claim in this Court that due process was violated because he did not receive a pre-revocation hearing under *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-783, doubtless because petitioner at all relevant times has been free of incarceration, either on his own recognizance or on bond, and because he was afforded a preliminary hearing on an underlying offense relating to the

Contrary to petitioner's claim, the record shows beyond any doubt whatsoever that petitioner received more than adequate notice of the claimed violations of the probationary terms, and it further shows that petitioner at no time objected at the probation revocation proceedings in superior court upon the grounds that he had not received adequate notice and had not had sufficient time to prepare his defense. Upon such a record, we submit that petitioner's claim cannot be considered.

First, the record shows that petitioner was formally charged with a violation of the probationary terms as early as June 1, 1977, when the matter was calendared in Department Northwest R of the Los Angeles Superior Court for a revocation hearing. During the revocation proceedings, the trial court indicated that the probation violation report, upon which the revocation proceedings were based, had been dictated by the probation officer on March 1, 1977. Testimony of the probation officer showed that the report was dated March 8. Petitioner's own counsel during one of the probation revocation hearings stated that the probation report had been written "three or four months ago" and that he had "glanced at the report here in court." Further, the State appellate record reflects that there were several continuances of the probation revocation proceedings from June to October 1977. For instance, on June 10, 1977, the records show that upon petitioner's motion the proceedings were continued to July 19, and that the probation revocation proceeding was trailing case No. A137015 (apparently a reference to petitioner's trial for receiving stolen property). On July 19, the matter was again continued upon petition-

stolen bonds, which evidence formed the basis for the revocation of probation. *See In re La Croix*, 12 Cal.3d 146, 150-151; *In re Law*, 10 Cal.3d 21; *People v. Vickers*, 8 Cal.3d 451, 459, fn.8; *People v. Buford*, 42 Cal. App.3d 975, 979-982.

er's motion to July 26.

Therefore, it is apparent that petitioner was on formal notice as early as June 1, 1977, that the State was moving to revoke his probation, based upon the probation violation report which was dated March 8, and undoubtedly filed sometime prior to or on June 1. Thus, petitioner had more than four months to prepare for the probation revocation hearing in October. At least two of the continuances during that period of time were at petitioner's own request. Petitioner, under California case law, had more than ample time and opportunity to acquaint himself with the charges. *People v. Buford, supra,* 42 Cal. App.3d 975, 982. Petitioner at no time in the trial court, in the California Court of Appeal, or before this Court, has alleged that he was not acquainted during the proceedings with the contents of the probation violation report which had been filed by June 1 and after March 8, 1977. Petitioner does not contend that the record discloses any lack of actual notice because of failure of the State to acquaint him with the charges prior to the probation revocation hearing in October.

Petitioner's contention that the trial court failed to provide him with a "written statement" of his alleged violations is hard to fathom. First, the trial court is under no obligation under California law to provide such a "written statement" to a defendant alleged to have violated the terms of his probation. Rather, this is a function of the probation department of the superior court and of the district attorney, when those agencies give written notice to the probationer of the intent to revoke probation. (Cal. Pen. Code § 1203.2; subd. b; *see* Petn. pp. 3-4.) Petitioner seems to argue as if there had been no probation violation report prepared by the probation officer at all. The record belies petitioner's argument, since it clearly reflects that petitioner was well aware of the

contents of the probation violation report during the hearings. Petitioner's contention that he never had an opportunity to prepare his defense is, quite simply, untrue. Petitioner had more than four months from the date of the filing of the probation revocation on or about June 1, 1977 to the time of the hearing. During that entire time the record shows that petitioner was represented by Attorney W. Russell, who was the same counsel representing him at the final revocation hearing in October.

The requirements of *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-783, as to due process of law were substantially complied with in this case. Petitioner received a full revocation hearing while represented by counsel and was given full and complete opportunity to cross-examine adverse witnesses, testify in his own behalf, and present evidence concerning mitigation. *See Morrissey v. Brewer* (1972) 408 U.S. 471, 489. Petitioner has wholly failed to show in his Petition whereby he did not receive adequate notice and opportunity to prepare a defense in keeping with the due process mandates of *Morrissey* and *Gagnon.*

Second, petitioner, as pointed out by the Court of Appeal, completely failed to object or move to dismiss the revocation hearing upon the grounds that he had not received adequate notice of the claimed violations of probation and thus did not have sufficient time to prepare his defense. Without conceding that petitioner did not receive written notice of the claimed violation (*see* Petn. p. 6), the Court of Appeal simply held that he had participated fully in the hearing without objection at its outset and during the course thereof and could not be heard to complain on appeal, citing *People v. Baker,* 38 Cal. App.3d 625, 629 and *People v. Buford, supra,* 42 Cal. App.3d 975, 982, which cases hold that failure to object waives any alleged lack of notice. It thus appears that

petitioner did not present the due process question adequately in the State court. The issue was not even considered on the merits by the Court of Appeal, except to note that petitioner had waived it by failing to complain prior to or during the revocation hearing. Since petitioner's first argument is grounded upon the Due Process Clause of the Fifth Amendment to the United States Constitution (*see* Petn. p. 8), we respectfully submit that such issue cannot be reached on Petition for Writ of Certiorari to this Court because of failure to properly preserve the issue. In *Street v. New York* (1969) 394 U.S. 576, 584, this Court stated that a claim of invalidity of a State statute under the constitution must be brought to the attention of the State court "with fair precision and in due time," citing *New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 62, 67, in order to preserve the issue on appeal. In *Street,* this Court held that the requirement was satisfied because the defendant had raised the constitutional issue by way of motion for new trial in the trial court, and on appeal in two appellate courts the question had been considered. However, in the instant case, petitioner wholly failed to raise such issue in the trial court, and the issue was not decided on its merits in the Court of Appeal's opinion.

In *Fuller v. Oregon* (1973) 417 U.S. 40, 50, this Court stated in footnote 11 that various due process claims raised by the petitioner could not be reached in this Court because those contentions were not raised in the State courts and were not discussed by the Oregon Court of Appeals. *Cf. Chambers v. Mississippi* (1972) 410 U.S. 284, 290 fn.3.

Since petitioner failed entirely to preserve the question of adequate notice upon due process grounds by failing to object or even mention such an issue in the trial proceedings leading to revocation, he may not raise such an issue

on Petition for Writ of Certiorari since the State courts have never been adequately presented with the question. *Fuller v. Oregon, supra,* 417 U.S., at p. 50, fn. 11. Had petitioner raised the issue timely in the trial court and moved to dismiss the proceedings on grounds of inadequate notice and lack of adequate preparation, the prosecution could have presented evidence in this regard to make a full record on appeal. Lastly, respondent points out that California case law holds that absent an objection in the record by the defendant, an appellate court will not imply an inadequate notice from a record which is silent as to exactly how the defendant was given notice of the charges of a probation violation. *People v. Baker, supra,* 38 Cal. App.3d 625, 629. Therefore, it is urged by respondent that this issue cannot be entertained by way of certiorari in this Honorable Court and must be disregarded.

II.

THE COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S REVOCATION OF PROBATION AND DID NOT SUBSTITUTE ITS OWN REASONS OR EVIDENCE FOR THAT OF THE TRIAL COURT.

Petitioner's second contention is that under *Gagnon* he was entitled to be given a written statement by the factfinder as to the evidence relied upon and the reasons for revoking his probation. *Gagnon v. Scarpelli, supra.* 411 U.S., at p. 786. He then asserts that the Court of Appeal "substituted its own reasons for revocation for those of the factfinder and its own evidence relied upon for his [*sic*]"[2] and claims that this was tantamount to a new

[2]The trial judge was the Honorable Joan Dempsey Klein.

"hearing" in the Court of Appeal where there was no evidence presented or opportunity to be heard. (Petn. pp. 8-9.)

Respondent seriously questions the propriety of this argument and whether it even presents a federal question or a constitutional issue reviewable on certiorari. The opinion of the California Court of Appeal makes it quite clear that it was upholding the trial court's revocation based upon the trial court's implicit finding that no notice had been provided to the probation officer or the district attorney of petitioner's sale of securities in direct violation of the terms of probation. (Petn. App. p. 5.) The Court of Appeal further clearly held that the trial court properly revoked probation under California Penal Code section 1203.2 because there was other evidence through the testimony of a credible witness which "sufficiently shows [petitioner's] misconduct." (Petn. App. p. 6.) As such, it is urged by respondent that the Court of Appeal properly reviewed the decision of the trial court and could not possibly be said to have substituted its own reasons for revocation; certainly the Court of Appeal did not substitute its own "evidence" for the evidence relied upon by the trial court judge. Indeed, the Court of Appeal specifically referred only to the trial court judge's statements concerning the evidence adduced at the hearing and to the testimony of the FBI undercover agent as being sufficient to show petitioner's misconduct on probation.

Petitioner never actually states to this Court that he *did not* receive a written statement by the factfinder as to the evidence relied upon and the reasons for revoking probation. *Gagnon v. Scarpelli, supra,* 411 U.S., at p. 786. Rather, petitioner merely argues that the Court of Appeal did not properly *review* his contentions and used different evidence to reach the same conclusion. Since the Court of

Appeal cited nothing that was not in the record on appeal, and since it specifically upheld the trial court upon the ground mentioned *supra,* petitioner's contention has no constitutional basis under 28 U.S.C. § 1257(3) and cannot be considered upon a Petition for Writ of Certiorari. The second contention of petitioner, we submit, is frivolous and finds no basis in fact or in law. The appellate record of the trial judge's findings as to petitioner's violation of probation would, in any case, be sufficient to show the evidence relied upon and the reasons given for revocation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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